

**U.S. ARMY CORPS OF ENGINEERS (USACE)  
NASHVILLE DISTRICT  
AUGUST 2019 - DRAFT MITIGATION  
BANKING INSTRUMENT TEMPLATE**



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## Exhibits

The following exhibits are attached to and incorporated by this reference into this MBI:

- “Exhibit A” - Bank Location Maps
- A-1 General Vicinity
  - A-2 Map of Property including Bank Property
- “Exhibit B” - Service Area Map(s) and Description(s)
- B-1 Map(s) of the Bank’s Service Area(s)
  - B-2 Narrative Description(s) of the Bank’s Service Area(s)
- “Exhibit C” - Mitigation Plan
- “Exhibit D” - Bank Management and Operation Documents
- D-1 Construction Financial Assurance Analysis and Schedule
  - D-2 Monitoring and Adaptive Management Financial Assurance Analysis and Schedule
  - D-3 Long-Term Management Fund Analysis and Schedule
  - D-4 Bank Closure Plan
- “Exhibit E” - Real Estate Records and Assurances
- E-1 [Title Report or Title Insurance Commitment](#)
  - E-2 [Title Insurance Policy or Certificate of Title \[attach once received\]](#)
  - E-3 Plat Map(s)
  - E-4 Property Assessment and Warranty
  - E-5 Site Protection Instrument
- “Exhibit F” - Bank Credits and Credit Transfers
- F-1 Credit Release Schedule
  - F-2 Credit Purchase Agreement and Payment Receipt Templates
  - F-3 Credit Transfer Ledger Template

“Exhibit G” – Baseline Ecological Assessment (submitted in Draft Prospectus or Prospectus)

“Exhibit H” - Jurisdictional Determination and Delineation of Waters of the U.S. and/or Waters of the State or Commonwealth *[if applicable]*

“Exhibit I” - Other Documentation, Permits, Amendments, or Revisions *[if applicable]*  
*[Includes the Department of the Army permit for the Bank; environmental documents, findings and notices prepared or filed to comply with federal or state environmental laws; water quality certification or waiver under § 401 of the Clean Water Act; and any other permits, authorization, or documentation needed to establish and maintain the Bank.]*

DRAFT

## Definitions

The initially-capitalized terms used and not defined elsewhere in this MBI are defined, for the purposes of this MBI, as set forth below.

“Adaptive Management” means the development of a management strategy that anticipates likely challenges associated with compensatory mitigation projects and provides for the implementation of actions to address those challenges, as well as unforeseen changes to those projects. It requires consideration of the risk, uncertainty, and dynamic nature of compensatory mitigation projects and guides modification of those projects to optimize performance. It includes the selection of appropriate measures that will ensure that the aquatic resource functions are provided and involves analysis of monitoring results to identify potential problems of a compensatory mitigation project and the identification and implementation of measures to rectify those problems.

“Adaptive Management Plan” means a management strategy to address unforeseen changes in site conditions or other components of the compensatory mitigation project, including the Party or Parties responsible for implementing Adaptive Management measures. The Adaptive Management Plan will guide decisions for revising compensatory mitigation plans and implementing measures to address both foreseeable and unforeseen circumstances that adversely affect compensatory mitigation success.

“As-Built Plan” means the report, including revised set of drawings submitted to USACE immediately following the completion of construction and/or planting that documents post-construction site conditions.

“Bank Establishment Date” is the date determined pursuant to Section IV, when the Bank is considered established and Transfer of Credits may begin.

“Bank Sponsor” means the public or private entity responsible for establishing and operating the Bank.

“Baseline Ecological Assessment” describes the biotic and abiotic baseline of the Bank Property in the form of **Exhibit G**, attached and made a part of this MBI.

“Conservation Easement” means a perpetual conservation easement, as defined by Tennessee, Alabama or Kentucky law (depending on Bank location), in the form of **Exhibit E-5**, attached and made a part of this MBI.

“Construction Phase” means the phase of the Bank in which all components required by 33 C.F.R. § 332.4(c) are fully developed, beyond concept, and included within the exhibits of this MBI. The Construction Phase ends upon successful completion of all of the modifications and planting as shown in the Mitigation Plan, and after USACE has provided written approval of the As-Built Plan, as detailed in Section II.E.

“Construction Financial Assurance” means the Financial Assurance specified in Section II.L.i.

and **Exhibit D-1** to be provided by the Bank Sponsor to guarantee the completion of construction and planting to establish, restore, enhance, and/or preserve Waters of the U.S. and/or Waters of the State or Commonwealth in accordance with the Mitigation Plan.

“Construction Financial Assurance Analysis and Schedule” means the third-party estimate or contract in **Exhibit D-1** that the MBI relied upon to determine the amount of the Construction Financial Assurance. If the Bank is to be established in phases, each Construction Phase must include a specific Construction Financial Assurance Analysis and Schedule.

“Credits” are units of measure representing the accrual, attainment, or protection of aquatic functions on the Bank Property. The measure of aquatic functions is based on the resources restored, established, enhanced, or preserved.

“Credit Release” means a determination by USACE, in consultation with the IRT, that Credits associated with an approved Mitigation Plan are available for sale or Transfer pursuant to this MBI, as set forth in Section II.E.

“Financial Assurance” can be defined generally as a mechanism that ensures a sufficient amount of money will be available for use to complete or replace a mitigation provider’s obligations to implement a required mitigation project and meet specified ecological Performance Standards, in the event the mitigation provider proves unable or unwilling to meet those obligations.

“Force Majeure” means conditions beyond the Bank Sponsor’s reasonable anticipation and control that significantly adversely affect its ability to perform its obligations under this MBI, such as flood, drought, lightning, earthquake, fire, landslide, condemnation or other taking by any governmental body. Force Majeure excludes mere economic hardship or the failure to attain Performance Standards.

“Grantee” means the entity authorized to hold the Conservation Easement pursuant to applicable state law and approval by USACE, in consultation with the IRT.

“Interagency Review Team (IRT)” means an interagency group of federal, tribal, state, or local regulatory and resource agency representatives that reviews documentation for, and advises the respective USACE district engineer on, the establishment and management of mitigation banks. The USACE district engineer or his or her designated representative serves as Chair of the IRT.

“Long-Term Management” means measures taken to ensure the long-term sustainability of the resource, including but not limited to: maintenance of signage, Conservation Easement enforcement, access/gate maintenance, fencing, tax payments, maintenance of property insurance, reporting, and other project-specific items as listed in the Long-Term Management Plan.

“Long-Term Management Fund” means the funds specified in **Exhibit D-3** to be used for perpetual management, maintenance, monitoring, and reporting pursuant to the Long-Term Management Plan.

“Long-Term Management Fund Analysis and Schedule” means the third-party estimate or contract in **Exhibit D-3** that the MBI relied upon to determine the amount of the Long-Term Management Fund.

“Long-Term Management Phase” means the period beginning upon conclusion of the Monitoring and Adaptive Management Phase and continuing in perpetuity, during which the Bank Property is to be managed, monitored, and maintained pursuant to the Long-Term Management Plan.

“Long-Term Management Plan” means the document included in the Mitigation Plan in **Exhibit C** that describes how the Bank Property will be managed, monitored, and maintained in perpetuity after performance standards have been achieved to ensure the sustainability of the resource, including long-term financing mechanisms and the party responsible for Long-Term Management.

“Mitigation Plan” means the overall plan that includes the items in 33 C.F.R. § 332.4(c)(2) through (c)(14) and governs the establishment, restoration, enhancement, and/or preservation activities required to be conducted on the Bank Property to establish Credits.

“Monitoring and Adaptive Management Financial Assurance” is the Financial Assurance to be provided by the Bank Sponsor to guarantee all Adaptive Management measures are implemented and all Performance Standards are met during the Monitoring and Adaptive Management Phase.

“Monitoring and Adaptive Management Financial Assurance Analysis and Schedule” means the third-party estimate or contract in **Exhibit D-2** that the MBI relied upon to determine the amount of the Monitoring and Adaptive Management Financial Assurance. If the Bank is to be established in phases, each Construction Phase must include a specific Monitoring and Adaptive Management Financial Assurance Analysis and Schedule.

“Monitoring and Adaptive Management Phase” means the phase initiated upon conclusion of the Construction Phase and continuing through the Monitoring Period. The Monitoring and Adaptive Management Phase ends once the final Performance Standards have been attained, any and all Adaptive Management measures have been successfully completed, and the Bank Sponsor has funded 100% of the Long-Term Management Fund.

“Monitoring Period” means the period established to demonstrate that a compensatory mitigation project has met Performance Standards.

“Performance Standards” means observable or measurable physical (including hydrological), chemical and/or biological attributes that are used to determine if a compensatory mitigation project meets its objectives.

“Property Assessment and Warranty” means the written property evaluation and assurance signed by the Property Owner and attached as **Exhibit E-4**.

“Property Owner” means the owner(s) of fee simple title to the Bank Property and grantor of the

Conservation Easement.

“Reporting Period” means the period from November 1st of the preceding year (or, if earlier, the Bank Establishment Date for the first annual report) through October 31st of the current year for annual reporting purposes.

“RIBITS” means the Regulatory In-Lieu Fee and Bank Information Tracking System, an online database used for bank management.

“Service Area” means the geographic area(s) within which impacts to Waters of the U.S. and/or Waters of the State or Commonwealth that occur may be mitigated or compensated through the Transfer of Credits from the Bank.

“Subordination Agreement” means a written, recorded agreement in which the holder of an interest in, or lien or encumbrance on the Bank Property consents to the recordation of the Conservation Easement and agrees to make the lien or encumbrance subject to and of lower priority than the Conservation Easement, even though the lien or encumbrance was recorded before the Conservation Easement.

“Transfer” means the use, sale, or conveyance of Credits by the Bank Sponsor.

“Waters of the State or Commonwealth” means any surface water or groundwater within the boundaries of the State of Tennessee, Alabama or Kentucky, as applicable to this MBI and as defined by the law of the respective state.

“Waters of the U.S.” means all waters and wetlands over which USACE and/or the USEPA are granted jurisdiction in the Clean Water Act, 33 U.S.C. §§ 1251, *et seq.*, and the Rivers and Harbor Act of 1899, 33 U.S.C. §§ 401, *et seq.* This definition encompasses both the term “waters of the United States” as defined in 33 C.F.R. Part 328 and “navigable waters of the United States” as defined in 33 C.F.R. Part 329.



**Note: The purpose of this template is to expedite Interagency Review Team (IRT) review of the proposed instrument. Any deviations from this template must be clearly marked (highlighted or red-lined) with an explanation for the requested change provided in the comments. All blue text should be replaced with project specific information. This template is not formatted for umbrella mitigation banks.**

## MITIGATION BANKING INSTRUMENT

### [BANK NAME] MITIGATION BANK

This Mitigation Banking Instrument (“MBI”), dated this \_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, is made by and among [Bank Sponsor’s full legal name(s)] (“Bank Sponsor”), [Property Owner’s full legal name(s)] (“Property Owner”), and [*delete name of any of the following agencies that is not a party*: the Nashville District of the U.S. Army Corps of Engineers (“USACE”), Louisville District of the U.S. Army Corps of Engineers (“USACE”), Memphis District of the U.S. Army Corps of Engineers (“USACE”), Region 4 of the U.S. Environmental Protection Agency (“USEPA”), the U.S. Fish and Wildlife Service (“USFWS”), the Natural Resources Conservation Service (“NRCS”), the Tennessee Valley Authority (“TVA”), the Tennessee Department of Environment and Conservation (“TDEC”), the Tennessee Wildlife Resources Agency (“TWRA”), Kentucky Department of Fish and Wildlife Resources (“KDFWR”), Kentucky Division of Water (“KDOW”), the Alabama Department of Environmental Management (“ADEM”), and the Alabama Department of Conservation and Natural Resources (“ADCNR”). [*Choose one*: These agencies comprise and are referred to jointly as the Interagency Review Team (“IRT”). *Or in the event one or more IRT members are not a party to the MBI use*: These agencies comprise and are referred to jointly as the “Signatory Agencies.” (*The second option requires conforming changes to other parts of the MBI.*)]. The Bank Sponsor, Property Owner, and the IRT are hereinafter referred to jointly as the “Parties.” This MBI sets forth the agreement of the Parties regarding the establishment, use, operation and maintenance of the [Bank name] Mitigation Bank (the “Bank”).

### RECITALS

- A. The Bank Sponsor is responsible for establishing, operating, and maintaining the Bank according to this MBI.
- B. The Property Owner is the owner of real property containing approximately \_\_\_ acres (the “Property”), located at \_\_\_\_\_ [*insert coordinates in decimal degrees, address and county*], State of (Alabama, Tennessee, or Kentucky), designated Assessor’s Parcel No(s). \_\_\_\_\_. The Property is generally shown on the Bank Location Maps (**Exhibit A**) and legally described in the Real Estate Records and Assurances (**Exhibit E**), attached to and made a part of this MBI.
- C. [*Choose one*: Bank Sponsor’s name or Bank Sponsor and Property Owner] desire(s) to create the Bank over [*add if applicable*: a \_\_\_-acre portion of] the Property (the “Bank Property”). The Bank Property is generally shown on the Bank Location Maps (**Exhibit**

A) and legally described in the Real Estate Records and Assurances (**Exhibit E**), attached to and made a part of this MBI. The Bank Property is to be conserved and managed in perpetuity as provided in Section IV and V.

- D. The IRT is the interagency group which oversees the establishment, use, operation, and maintenance of the Bank.
- E. The goals and objectives for the Bank are set forth in the Mitigation Plan (**Exhibit C**), attached to and made a part of this MBI.
- F. Initially capitalized terms used and not defined elsewhere in this MBI are defined above following the list of exhibits.

## AGREEMENT

The Parties therefore agree as follows:

### **Section I: Purpose and Authorities**

#### **A. Purpose**

The purpose of this MBI is to set forth the agreement of the Parties regarding the establishment, use, operation, and maintenance of the Bank. The purpose of the Bank is to compensate for unavoidable impacts to Waters of the U.S. and/or Waters of the State or Commonwealth. The Bank Sponsor [and Property Owner] shall preserve, restore, establish, and/or enhance and then manage and maintain Waters of the U.S. and/or Waters of the State or Commonwealth in accordance with this MBI and the Mitigation Plan.

#### **B. Authorities**

The establishment and use of the Bank for off-site compensatory mitigation is subject to one or more of the following statutes, regulations, policies, and guidelines:

##### **i. Federal**

- a. Clean Water Act (33 U.S.C. §§ 1251, *et seq.*)
- b. Memorandum of Agreement (MOA) Between the Department of the Army and the Environmental Protection Agency: The Determination of Mitigation Under the Clean Water Act (“CWA”) Section 404(b)(1) Guidelines (February 6, 1990)
- c. Section 404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material (40 C.F.R. Part 230)
- d. Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403)
- e. National Environmental Policy Act (“NEPA”) (42 U.S.C. §§ 4321, *et seq.*)

- f. Endangered Species Act (“ESA”) (16 U.S.C. §§ 1531, *et seq.*)
- g. Fish and Wildlife Coordination Act (16 U.S.C. §§ 661, *et seq.*)
- h. Manuson-Stevens Fishery Conservation and Management Act (16 U.S.C. §§ 1801, *et seq.*)
- i. Section 110 of the National Historic Preservation Act (54 U.S.C. §§ 306101, *et seq.*)
- j. Regulatory Policies of the U.S. Army Corps of Engineers (33 C.F.R. Parts 320–332)
- k. Regulatory Guidance Letter (RGL) 05-01. Guidance on the Use of Financial Assurances, and Suggested Language for Special Conditions for Department of the Army (DA) Permits Requiring Performance Bonds
- l. RGL 08-03. Minimum Monitoring Requirements for Compensatory Mitigation Projects Involving the Restoration, Establishment, and/or Enhancement of Aquatic Resources
- ii. **State** *[Include relevant AL, KY, and/or TN laws, and other state, tribal, and/or local authorities, as appropriate]*
  - a. Alabama Water Pollution Control Act (Ala. Code §§ 22-22-1 to -14)
  - b. Alabama Environmental Management Act (Ala. Code §§ 22-22A-1 to -17)
  - c. Alabama Department of Environmental Management, Water Division, Water Quality Program (Ala. Admin. Code r. 335-6-1-.01 to -6-.23)
  - d. Kentucky Environmental Protection State–Federal Relations (Ky. Rev. Stat. Ann. §§ 214.16-040 to -070)
  - e. Kentucky Water Quality Authority (Ky. Rev. Stat. Ann. §§ 224.70-100 to -150)
  - f. Kentucky Energy and Environment Cabinet, Department for Environmental Protection Regulations (401 Ky. Admin. Regs. 4:010 to :300, 9:010 to :020, 10:026 to :031)
  - g. Tennessee Water Quality Control Act of 1977 (Tenn. Code Ann. §§ 69-3-101 to -148)
  - h. Tenn. Comp. R. & Regs. 0400-40-07-.01 to .04

iii. **Disclaimer**

This MBI does not limit the legal authorities or responsibilities of the IRT or any IRT agency in any manner.

**Section II: Mitigation Plan**

- A. Goals and Objectives:** *[Insert a description of the resource type(s) and amount(s) that will be provided, the method of compensation (i.e., restoration, establishment, enhancement, or preservation), and the manner in which the resource functions of the compensatory mitigation project will address the needs of the watershed, ecoregion, physiographic province, or other geographic area of interest.]*
- B. Site Selection:** *[Insert a description of the factors considered during the site selection process. This should include consideration of watershed needs, onsite alternatives where applicable, and the practicability of accomplishing ecologically self-sustaining aquatic resource restoration, establishment, enhancement, and/or preservation at the compensatory mitigation project site. See 33 C.F.R. § 332.3(d).]*
- C. Site Protection Instrument:** *[Insert a description of the legal arrangements and instrument, including site ownership that will be used to ensure the long-term protection of the compensatory mitigation project site. See 33 C.F.R. § 332.7(a).]*
- i. **Title Report or Title Insurance Commitment.** Property Owner shall notify USACE of any errors or discrepancies in the **title report or title insurance commitment** provided (**Exhibit E-1**). *[A title report is a written analysis of the status of title to real property, including a property description, names of titleholders and how title is held, tax rate, encumbrances (all easements, mortgages, liens, rights of way, deeds of trusts, recorded judgments, or other encumbrances that affect rights to develop the Bank Property as planned and the ability to place conditions or restrictions on the Bank Property), and real property taxes due. A title insurance commitment is issued by a qualified title company or its agent based upon a preliminary title search that commits the title company to issue a final certificate of title or title insurance policy in the approved form.]*
- ii. **Title Insurance Policy or Certificate of Title.** Prior to final authorization of the Bank or any Credit Release, a **title insurance policy or certificate of title** shall be provided for the subject property (**Exhibit E-2**). The **title insurance policy or certificate of title** provided shall disclose any and all liens, encumbrances, easements, restrictions, leases, mortgages, mineral rights or other possessory or non-possessory interests in or on the Bank Property, recorded or unrecorded, of which the Bank Sponsor or Property Owner has knowledge or reasonably can be expected to have knowledge. Any property interest that interferes with or is in conflict with the establishment and protection of the Bank must be subordinated to the use of the Bank Property as a compensatory mitigation site in a recorded agreement approved by USACE (“Subordination

Agreement”).

- iii. **Plat Map(s)**. Plat maps supporting the Real Estate Records and Assurances in **Exhibit E** are provided, which illustrate the physical extent of the title exceptions and identify the locations of all structures, roads, fences, and other physical improvements on the subject property (**Exhibit E-3**).
- iv. **Property Assessment and Warranty**. The Property Owner must complete the Property Assessment and Warranty template approved by the IRT (**Exhibit E-4**). The Property Assessment and Warranty demonstrates that the Bank Sponsor has the right to perform and protect in perpetuity all work, functions and values under the MBI.
- v. **Real Estate Instrument**. *[Include a Conservation Easement to provide long-term protection for the compensatory mitigation project site, in accordance with 33 C.F.R. § 332.7(a).]* (**Exhibit E-5**).

**D. Baseline Conditions:** *[Insert a description of the ecological characteristics of the proposed compensatory mitigation project site, a detailed description of which will be attached in Exhibit G. This may include descriptions of historic and existing plant communities, historic and existing hydrology, soil conditions, a map showing the Bank Property, the geographic coordinates, and other site characteristics appropriate to the type of resource proposed for compensatory mitigation. The baseline information should also include a delineation of Waters of the U.S. on the proposed compensatory mitigation project site.]* The current condition of the Bank Property is described in the Mitigation Plan (**Exhibit C**) and the Baseline Ecological Assessment (**Exhibit G**), attached to and made a part of this MBI.

**E. Determination of Credits:** *[Insert a description of the number of Credits to be provided, including a brief explanation of the rationale for this determination. The explanation shall describe the proposed mitigation approach for each wetland and stream reach within the project site that will be considered in the Mitigation Plan (establishment, re-establishment, rehabilitation, enhancement, preservation – listed separately). This description should be accompanied by a list presented in a table and organized by wetland or stream reach, area/length, proposed mitigation approach, and proposed mitigation ratio. See 33 C.F.R. § 332.3(f).]*

- i. Credit Release.

Upon receipt of the Bank Sponsor’s written request and accompanying documentation of compliance with all applicable requirements set forth in this Section, USACE may release Waters of the U.S. Credits for Transfer as described below and in the Credit Release Schedule (**Exhibit F-1**). The applicable state agency may provide Credit Releases for Waters of the State or Commonwealth pursuant to the procedures set forth in this Section. For purposes of Credit Releases for Waters of the State or Commonwealth pursuant to this Subsection, any reference to “Waters of the U.S.” and

“USACE” shall constitute a reference to “Waters of the State or Commonwealth” and the applicable state agency, respectively.

The Credit Release Schedule will be tied to achievement of specific milestones, including meeting all Performance Standards. Monitoring of Performance Standards for Credit Releases is required for a minimum of **seven years** for streams and wetlands. Early achievement of Performance Standards will not accelerate Credit Releases. All Credit Releases must be approved by USACE, in consultation with the IRT, based on a determination that required milestones have been achieved. USACE, in consultation with the IRT, may modify the Credit Release Schedule, including reducing the number of available Credits or suspending Credit sales or Transfers all together, where necessary, to ensure that all Credit sales or Transfers remain tied to the Bank’s likelihood of meeting Performance Standards.

Each Waters of the U.S. and/or Waters of the State or Commonwealth Credit Release is contingent upon the Bank Sponsor’s submission of the annual report for the current Reporting Period, an IRT site inspection at the appropriate time of year, as determined by USACE, and USACE determination, in consultation with the IRT, that applicable milestones and Performance Standards have been achieved.

ii. Credit Release Schedule.

Upon each Credit Release, USACE shall enter the number of Credits Released into RIBITS. The applicable Credit Release shall occur prior to any Credit Transfer.

[Credits may be released as follows:

Wetland Mitigation Credit Release Schedule

| Release | Information Required  | Percent Credit Release (%) |
|---------|---|----------------------------|
| 1       | <ul style="list-style-type: none"> <li>- Signed approval of the MBI and Mitigation Plan.</li> <li>- Proof of property ownership, title report or title insurance commitment, and title insurance policy or certificate of title.</li> <li>- A copy of a signed, approved, and recorded Conservation Easement that protects the site in perpetuity is provided to USACE.</li> <li>- Securing of the Construction Financial Assurance.</li> <li>- The Bank Sponsor has obtained all permits, authorizations and other approvals necessary or appropriate to construct, operate, and maintain the Bank, including but not limited to those of any IRT agency.</li> </ul> | 20                         |
| 2       | <ul style="list-style-type: none"> <li>- Completion of hydrologic modification &amp; planting as shown in the Mitigation Plan.</li> <li>- USACE approval of the As-Built Plan.</li> </ul>   | 20                         |
| 3       | <ul style="list-style-type: none"> <li>- Submit YR 1 monitoring report; No Credit Release</li> </ul>  | -                          |

|   |   |    |
|---|---|----|
| 4 | - Project successfully meets Performance Standards in the YR 2 monitoring report.<br>- Monitoring and Adaptive Management Financial Assurance is fully funded.  | 15 |
| 5 | - No YR 3 monitoring report required; No Credit Release   | -  |
| 6 | - Project successfully meeting Performance Standards in the YR 4 monitoring report.   | 20 |
| 7 | - Submit YR 5 monitoring report; No Credit Release  | -  |
| 8 | - No YR 6 monitoring report required; No Credit Release   | -  |
| 9 | - Any required Adaptive Management is completed.<br>- The Bank Sponsor has submitted a Waters of the U.S. jurisdictional delineation for the Bank Property.<br>- Final Performance Standards have been attained in the seventh monitoring year.<br>- The Bank Sponsor has funded 100% of the Long-Term Management Fund. | 25 |

Stream Mitigation Credit Release Schedule

| Release | Information Required  | Percent Credit Release (%) |
|---------|---|----------------------------|
| 1       | - Signed approval of the MBI and Mitigation Plan.<br>- Proof of property ownership, title report or title insurance commitment, and title insurance policy or certificate of title.<br>- A copy of a signed, approved, and recorded Conservation Easement that protects the site in perpetuity is provided to USACE.<br>- Securing of the Construction Financial Assurance.<br>- The Bank Sponsor has obtained all permits, authorizations and other approvals necessary or appropriate to construct, operate, and maintain the Bank, including but not limited to those of any IRT agency. | 20                         |
| 2       | - Completion of site modifications & planting as shown in the Mitigation Plan.<br>- USACE approval of the As-Built Plan.  | 20                         |
| 3       | - Submit YR 1 monitoring report; No Credit Release  | -                          |
| 4       | - Project successfully meets Performance Standards in the YR 2 monitoring report.<br>- Monitoring and Adaptive Management Financial Assurance is fully funded.  | 15                         |
| 5       | - No YR 3 monitoring report required; No Credit Release   | -                          |
| 6       | - Project successfully meeting Performance Standards in the YR 4 monitoring report.   | 20                         |
| 7       | - Submit YR 5 monitoring report; No Credit Release  | -                          |

|   |  |    |
|---|--|----|
| 8 | - No YR 6 monitoring report Required; No Credit Release  | -  |
| 9 | - Any required Adaptive Management is completed.<br>- Final Performance Standards have been attained in the seventh monitoring year.<br>- The Bank Sponsor has funded 100% of the Long-Term Management Fund. | 25 |

iii. As-Built Plan Submittal.

The Bank Sponsor shall submit As-Built Plan drawings of the Bank Property, with accurate maps of the established, enhanced, and/or restored Waters of the U.S. and/or Waters of the State or Commonwealth to USACE no later than ninety (90) calendar days following completion of construction associated with the establishment, restoration, and/or enhancement of the Waters of the U.S. and/or Waters of the State or Commonwealth on the Bank Property. The As-Built drawings shall consist of full size construction plans, with As-Built conditions clearly shown. The As-Built drawings and any attachments must describe in detail any deviation from the Mitigation Plan.

**F. Mitigation Work Plan:** *[Insert a description of the mitigation work plan, a detailed plan of which will be included in the Mitigation Plan attached as Exhibit C. The mitigation work plan should contain detailed written specifications and work descriptions for the Bank, including, but not limited to, the geographic boundaries of the project; construction methods, timing, and sequence; source(s) of water, including connections to existing waters and uplands; methods for establishing the desired plant community; plans to control invasive plant species; the proposed grading plan, including elevations and slopes of the substrate; soil management; and erosion control measures. For mitigation banks proposing stream restoration (rehabilitation or reestablishment), the mitigation work plan should also include: planform geometry, channel form (e.g., typical channel cross-sections), watershed size, design discharge, riparian area plantings, and other relevant information].*

**G. Maintenance Plan:** *[Insert a description and schedule of maintenance requirements to ensure the continued viability of the resource once initial construction is completed].*

**H. Performance Standards:** *[Insert a description of Performance Standards, including detailed Performance Standards in the Mitigation Plan attached as Exhibit C. Appropriate Performance Standards are ecologically-based standards that will be used to determine whether the mitigation bank is achieving its objectives. Performance Standards should relate to the objectives of the mitigation bank, so the bank can be objectively evaluated to determine if it is developing into the desired resource type, providing expected functions, and attaining any other applicable metrics (e.g. acres). Performance Standards must be based on attributes that are objective and verifiable. Ecological Performance Standards must be based on the best available science that can be measured or assessed in a practicable manner. Performance Standards may be based on variables or measures of functional capacity described in functional assessment methodologies, measurements of*



hydrology or other aquatic resource characteristics, and/or comparisons to reference aquatic resources of similar type and landscape position. The use of reference aquatic resources to establish Performance Standards will help ensure that those Performance Standards are reasonably achievable, by reflecting the range of variability exhibited by the regional class of aquatic resources as a result of natural processes and anthropogenic disturbances. Performance Standards based on measurements of hydrology should take into consideration the hydrologic variability exhibited by reference aquatic resources, especially wetlands. Where practicable, Performance Standards should take into account the expected stages of the aquatic resource development process, in order to allow early identification of potential problems and appropriate Adaptive Management. In general, Performance Standards should be SMART (Specific, Measureable, Attainable, Reasonable (Practicable), Trackable). See 33 C.F.R. § 332.5.]

**I. Monitoring Requirements:** *[Monitoring the Bank is necessary to determine if the Bank is meeting its Performance Standards and if measures are necessary to ensure the Bank is accomplishing its objectives. The submission of monitoring reports to assess the development and condition of the compensatory mitigation project is required, but the content and level of detail for those monitoring reports must be commensurate with the scale and scope of the mitigation bank, as well as the mitigation bank type. The Mitigation Plan must address the monitoring requirements for the Bank, including the parameters to be monitored, the length of the Monitoring Period, the party responsible for conducting the monitoring, the frequency for submitting monitoring reports to USACE and the IRT, and the party responsible for submitting those monitoring reports to USACE and the IRT. See 33 C.F.R. § 332.6.]*

**i. Monitoring Methods:** *[Insert a description of monitoring methods with detailed monitoring methods included in the Mitigation Plan attached as **Exhibit C**. In general, compensatory mitigation monitoring methods should include quantitative sampling methods following established, scientific protocols. Sampling documentation, as part of monitoring reports, should include maps and coordinates (also shapefiles, if available) showing locations of sampling points, transects, quadrats, etc. In addition, permanent photo stations should be established coincident with sampling locations. Additionally, where structures are placed in Waters of the U.S. and/or State, photo stations should be established that capture the structures and any consequent effect on channel morphology.*

*Monitoring reports shall be prepared in accordance with RGL 08-03, which identifies specific contents and formatting of the report. Monitoring reports shall include the data collected from all applicable sections of this guidance; however, not all monitoring reports will include the same information (e.g., for seven-year monitoring periods, monitoring reports submitted in years four and six typically will not include vegetation plot data). Performance Standards, as provided in the Mitigation Plan or in the permit conditions, must be restated verbatim in the monitoring report. Additionally, each monitoring report shall include baseline data and data from preceding monitoring years presented in both graphic and tabular forms.*

*Stream mitigation banks with in-channel modifications, high levels of complexity and scale shall provide As-Built surveys that include at minimum the following information: photo documentation at all cross-sections and structures, a plan view survey, a longitudinal profile, and vegetation information (type, number and location of species planted).*

*As-Built Plan surveys for wetland mitigation projects shall be completed immediately following the completion of construction to document post-construction conditions. Projects provide As-Built Plan surveys that include the following: photo documentation at permanent documented photo points with bearing and azimuth, a plan view diagram, baseline location and in-situ soil profile descriptions at well locations, and vegetation information (type, number of species planted). Also, any special permit condition relating to signage or Deed Restriction should be submitted. These projects shall also provide location data including coordinates and shapefiles, if available, of all monitoring activities (permanent vegetation plots, wells, piezometers, pressure transducer gages, surface water gauges, crest gauges, stream cross-sections, bank pins, water quality and aquatic biota sampling points, etc.).]*

**ii. Adaptive Management Measures:** USACE shall be notified as soon as possible if applicable ecological Performance Standards are not met for all or any portion of the compensatory mitigation project in any year, or if any large-scale corrective measures are required. Appropriate measures outlined in the Adaptive Management Plan should be immediately implemented after receiving USACE written approval. If appropriate measures are not captured in the Adaptive Management Plan, then the Bank Sponsor shall prepare an analysis of the cause(s) of failure(s) and, if determined necessary by USACE, propose Adaptive Management measures for approval. Modifications to the approved Mitigation Plan require additional approval by USACE.

**iii. General Monitoring Requirements:** Site monitoring shall occur for a minimum of seven years post-construction. *[Delete if not applicable - Wetland mitigation bank monitoring shall occur for a minimum of seven years post-construction, except in those circumstances where specific hydrologic monitoring well data and hydric soil indicators have documented wetland hydrology and hydric soil indicators for five consecutive years under normal rainfall conditions, in which case, monitoring activities focused on hydrology and soils may be terminated as early as five years.]* If Performance Standards have not been met within the established Monitoring Period, or if Adaptive Management is required, additional monitoring may be required to ensure the mitigation bank is stable and the target community is established; otherwise, the project may be deemed to have failed.

Planted vegetation must be in the ground for at least 180 days prior to the initiation of the first year of monitoring (Year 1). Monitoring reports shall be completed for each year of monitoring and provided to USACE for review no later than October 31st of the monitoring year. If the monitoring reports indicate that replanting or other Adaptive Management measures are necessary, additional monitoring may be required if the

activities cannot be accomplished during the planting season. Failure to provide monitoring reports by this deadline may result in additional monitoring, withholding the release of Credits, suspension of Credit sales, and/or utilization of Financial Assurances. USACE, in consultation with the IRT, will determine the appropriate action for the mitigation bank to take if they fail to submit monitoring reports.

As-Built Plan surveys for the Bank shall be completed immediately following the completion of construction to document post-construction conditions. The As-Built Plan shall be submitted to the USACE within 90 calendar days of project construction.

**J. Long-Term Management Plan:** *[Provide a description of how the mitigation bank will be managed after Performance Standards have been achieved to ensure the long-term sustainability of the resource, including long-term financing mechanisms and the party responsible for Long-Term Management. Long-Term Management activities may include, but are not limited to: Maintenance of Signage, Conservation Easement Enforcement, Access/Gate Maintenance, Fencing, Non-Native Invasive Species Management, Tax Payments, Maintenance of Property Insurance, Reporting, and other project-specific items as listed in the Long-Term Management Plan. See 33 C.F.R. § 332.7(d).]*

At the end of the Monitoring and Adaptive Management Phase, *[insert the name of the Party, Conservation Easement Grantee, or land stewardship entity responsible for long-term management of the Bank, subject to USACE approval]* shall be obligated to manage, monitor, and maintain the Bank Property in perpetuity in accordance with this MBI, the Conservation Easement, and the Long-Term Management Plan. Such activities shall be funded with funds disbursed from the Long-Term Management Fund according to Section II.L.iii.

*[Insert the name of the Party, Conservation Easement Grantee, or land stewardship entity responsible for long-term management of the Bank, subject to USACE approval]*, USACE, and the IRT members shall meet and confer upon the request of any one of them to consider revisions to the Long-Term Management Plan in the Mitigation Plan (**Exhibit C**) and Long-Term Management Fund Analysis and Schedule (**Exhibit D-3**), as necessary or appropriate.

If insufficient funding is available from the Long-Term Management Fund interest and earnings, or if Long-Term Management expenses exceed those estimated in the Long-Term Management Fund Analysis and Schedule (**Exhibit D-3**), the *[insert the name of the Party, Conservation Easement Grantee, or land stewardship entity responsible for long-term management of the Bank, subject to USACE approval]* shall consult with USACE and the IRT in accordance with Section II.L.iii.a.5.

During the Long-Term Management Phase, the *[insert the name of the Party, Conservation Easement Grantee, or land stewardship entity responsible for long-term management of the Bank, subject to USACE approval]* shall be responsible for submitting biennial (every two years) reports to USACE in accordance with Section VI.B of this MBI. The Conservation Easement Grantee shall upload all Long-Term Management reports into

RIBITS.

i. ***Reporting on the Long-Term Management Fund.***

By April 1st of each year following the Bank Establishment Date and until the Long-Term Management Fund is 100% funded, the Bank Sponsor shall report to USACE, in hard copy and in editable electronic format, the following values:

- a. The adjusted Long-Term Management Fund amount determined in accordance with Section II.L.iii.
- b. The resulting adjusted Long-Term Management Fund deposit amounts.

**K. Adaptive Management Plan:** *[Provide a management strategy to address unforeseen changes in site conditions or other components of the compensatory mitigation project, including the party or parties responsible for implementing Adaptive Management. The Adaptive Management Plan will guide decisions for revising compensatory mitigation plans and implementing measures to address both foreseeable and unforeseen circumstances that adversely affect compensatory mitigation success. See 33 C.F.R. § 332.7(c).]*

Prior to Bank closure, if any Party discovers any failure to achieve the Performance Standards or any injury or adverse impact to the Bank Property as preserved, restored, or enhanced, the Party making the discovery shall notify the other Parties in writing. USACE, in consultation with the IRT, may require the Bank Sponsor to develop and implement Adaptive Management measures to correct such condition. Within sixty (60) calendar days of the date of written notice from USACE, the Bank Sponsor shall develop Adaptive Management measures in accordance with the Adaptive Management Plan (**Exhibit C**) and submit the proposed Adaptive Management measures to USACE for written approval. The proposal must identify and describe Adaptive Management measures to achieve the Performance Standards or remedy injury or adverse impact to the Bank Property and set forth a schedule within which the Bank Sponsor will implement those actions. The Bank Sponsor shall, at Bank Sponsor's cost, implement the Adaptive Management measures that USACE, in consultation with the IRT, determines are appropriate. The Adaptive Management measures may include site modifications, design changes, revisions to maintenance requirements, and revised monitoring requirements. The Adaptive Management measures must be designed to ensure that the modification compensatory mitigation project provides aquatic resource functions comparable to those described in the Mitigation Plan objectives. The annual report required under Section VI.B shall identify and describe the Adaptive Management measures proposed, approved, or performed during the Reporting Period and, if Adaptive Management has been completed, evaluate its effectiveness.

If (a) the Bank Sponsor fails to develop and submit Adaptive Management measures to USACE or fails to implement the Adaptive Management measures USACE determines are appropriate in accordance with the Adaptive Management Plan and this Section, or (b) proposed Adaptive Management measures are approved and implemented, but the site

conditions do not satisfy the approved plan's objective and measurable Performance Standards by the dates specified in the approved plan, then USACE, in consultation with the IRT, may find the Bank Sponsor in default pursuant to Section IX.E and take action accordingly.

The Bank Sponsor shall be responsible for conducting management, monitoring, and maintenance activities in accordance with the Adaptive Management Plan (**Exhibit C**) until the end of the Monitoring and Adaptive Management Phase. The Bank Sponsor shall upload all reports for which it is responsible into RIBITS.

**L. Financial Assurances:** *[Provide a description of Financial Assurances that will be provided and how they are sufficient to ensure a high level of confidence that the compensatory mitigation project will be successfully completed, in accordance with its Performance Standards. See 33 C.F.R. § 332.3(n).]*

The Bank Sponsor is responsible for providing Financial Assurances for the performance and completion of Bank construction, management, and monitoring in accordance with this MBI, as set forth in this Section. The Financial Assurances shall be held by a qualified third party approved by USACE, in consultation with the Bank Sponsor and the IRT. Upon the furnishing of each of the following Financial Assurances, the Bank Sponsor shall provide written confirmation to USACE from the holder of the Financial Assurance, as applicable, that the requirement to provide the following Financial Assurances was completed in accordance with Section IX.K:

**i. Construction Financial Assurance**

Prior to the first Credit Release, the Bank Sponsor shall furnish a Construction Financial Assurance in the amount of 100% of a reasonable third-party estimate or contract to establish, restore, or enhance Waters of the U.S. and/or Waters of the State or Commonwealth in accordance with the Mitigation Plan in the amount specified in **Exhibit D-1**. *[Provide a copy of the third-party estimate or contract that is being relied upon to determine the amount of the Construction Financial Assurance. If the Bank is to be established in phases, include a specific Construction Financial Assurance Analysis and Schedule for each Construction Phase. This information will be provided in Exhibit D-1.]* The Construction Financial Assurance shall be in the form of *[select Financial Assurance instrument: a performance bond, an escrow account, casualty insurance, an irrevocable standby letter of credit, or other appropriate instrument, subject to the approval of USACE]*. The Bank Sponsor shall ensure the Construction Financial Assurance remains in effect in the full amount required by this MBI throughout the performance of construction and planting to establish, restore, or enhance Waters of the U.S. and/or Waters of the State or Commonwealth on the Bank Property in accordance with the Mitigation Plan. The fully funded amount will be \$\_\_\_\_\_ based upon information furnished in **Exhibit D-1**.

**a. Construction Financial Assurance Contingency Plan**

1. Should a claim on the Construction Financial Assurance become necessary, the **[Bank Name]** Mitigation Bank **[Version Date]**

*[insert name of the standby trust (for performance bonds and letters of credit)]* shall allocate funds to *[insert name of the entity identified as the beneficiary]*, who shall be entitled to draw upon the Construction Financial Assurance if:

*or, if other Financial Assurance instrument:*

Should a claim on the Construction Financial Assurance become necessary, the *[insert name of the third-party beneficiary (for escrow accounts, casualty insurance, or other appropriate assurance instrument)]* shall be entitled to draw upon the Construction Financial Assurance if:

any Transfer of Credits has been made; and either (a) after the Bank Establishment Date, but no later than the first full growing season after the date of the first Credit Transfer, USACE, in consultation with the IRT, determines that the Bank Sponsor has not initiated construction and planting in accordance with the Mitigation Plan, or (b) two years has elapsed since the Bank Sponsor has initiated implementation of the Mitigation Plan, and construction and planting in accordance with the Mitigation Plan is not complete.

2. In the event of a claim, it would be the responsibility of the beneficiary receiving the funds to develop a proposal for accomplishing the mitigation project goals. USACE in coordination with the IRT would have the ability to review and approve the plan prior to implementation.
3. The Construction Financial Assurance shall be phased out by USACE, in consultation with the IRT, only after the Bank Sponsor completes the construction and planting activities in accordance with the Mitigation Plan, as demonstrated by:
  - Bank Sponsor's submission of As-Built Plan drawings in accordance with Section II.E.iii. and Section II.I;
  - an on-site inspection by the IRT; and
  - written approval from USACE.

ii. ***Monitoring and Adaptive Management Financial Assurance***

Before the first Credit Release in the Monitoring and Adaptive Management Phase, the Bank Sponsor shall furnish to USACE Monitoring and Adaptive Management Financial Assurance in the amount specified in **Exhibit D-2**. *[The Monitoring and Adaptive Management Financial Assurance Analysis and Schedule shall consist of a table and/or spreadsheet that shows all of the tasks (management, monitoring, reporting); task descriptions; labor (hours); cost per unit; cost, frequency, timing or scheduling of the tasks; the total annual funding necessary for each task; and any associated assumptions for each task required during the Monitoring and Adaptive Management Phase. The total annual expenses should include administration and contingency costs. If the Bank is to be established in phases, include a specific Monitoring and Adaptive Management Financial Assurance Analysis and Schedule for*

*each Construction Phase. Cost estimates should be based on tasks implemented by a third party in present day dollars or equipment prices in present day dollars. This information will be provided in **Exhibit D-2.***

The Monitoring and Adaptive Management Financial Assurance shall be in the form of *[select Financial Assurance instrument: performance bond, escrow account, casualty insurance, an irrevocable standby letter of credit, or other appropriate instrument, subject to the approval of USACE]*. The Bank Sponsor shall ensure the Monitoring and Adaptive Management Financial Assurance remains available in the full amount required by this MBI until the end of the Monitoring and Adaptive Management Phase. The fully funded amount will be \$\_\_\_\_\_ based upon information furnished in **Exhibit D-2**.

a. Monitoring and Adaptive Management Financial Assurance Contingency Plan

1. Should a claim on the Monitoring and Adaptive Management Financial Assurance become necessary, the *[insert name of the standby trust (for performance bonds and letters of credit)]* shall allocate funds to *[insert name of the entity identified as the beneficiary]*, who shall be entitled to draw upon the Monitoring and Adaptive Management Financial Assurance if:

*Or, if other Financial Assurance instrument:*

Should a claim on the Financial Assurance become necessary, the *[insert name of the third-party beneficiary]* shall be entitled to draw upon the Monitoring and Adaptive Management Financial Assurance if:

any Transfer of Credits has been made, and either (a) the Bank Sponsor fails to develop and submit Adaptive Management measures to USACE or fails to implement the Adaptive Management measures USACE determines are appropriate, or (b) proposed Adaptive Management measures are approved and implemented, but the site conditions do not satisfy the approved plan's objective and measurable Performance Standards by the dates specified in the approved plan.

2. If any portion of the Monitoring and Adaptive Management Financial Assurance is drawn upon pursuant to Section I.L.ii., then the Bank Sponsor shall replenish the Monitoring and Adaptive Management Financial Assurance to the amount specified in **Exhibit D-2** within 90 calendar days after written notice from USACE.
3. The Monitoring and Adaptive Management Financial Assurance shall be released to the Bank Sponsor after all Performance Standards have been met and all Adaptive Management, if any, has been completed, as evidenced by:
  - timely submission of all required annual reports in accordance with Section VI;
  - the third anniversary of the completion of all Adaptive Management required, if any, in accordance with the Adaptive Management Plan and this MBI;

- an on-site inspection by the IRT; and
- written approval from USACE.

iii. **Long-Term Management Fund**

The Bank Sponsor shall fully fund (100%) the Long-Term Management Fund prior to the final Credit Release in the amount specified in **Exhibit D-3**. USACE, in consultation with the IRT, will determine if sufficient funds are available for the Long-Term Management Fund prior to the final Credit Release.

*[The Long-Term Management Fund Analysis and Schedule included in **Exhibit D-3** shall consist of a table and/or spreadsheet that shows the projected annual capitalization rate; all of the tasks (management, monitoring, reporting); task descriptions; labor (hours); cost per unit; cost, frequency, timing or scheduling of the tasks; the total annual funding necessary for each task; and any associated assumptions for each task required by the Long-Term Management Plan. The total annual expenses should include, but are not limited to, administration and contingency expenses. The Long-Term Management Fund Analysis and Schedule is developed assuming that each Construction Phase is constructed and managed by itself without the economies of scale or other cost reductions that may occur if all Construction Phases are implemented. Property Analysis Record (PAR) (Center for Natural Lands Management), Long-Term Stewardship Calculator (The Nature Conservancy), or similar methods may be used for determining the amount of principal required to fully fund the Long-Term Management Fund. Cost estimates should be based on tasks implemented by a third party in present day dollars or equipment prices in present day dollars].*

The Bank Sponsor shall place the Long-Term Management Fund into a non-wasting endowment fund. Other long-term financing mechanisms, including trusts, contractual arrangements with responsible parties, and other appropriate financial instruments, may be considered by USACE in consultation with the IRT on a case-by-case basis. The Long-Term Management Fund shall be in an amount sufficient to fully provide for the financial requirements of the Long-Term Management of the Bank in accordance with the Long-Term Management Plan (**Exhibit C**) and the Long-Term Management Fund Analysis and Schedule (**Exhibit D-3**). USACE may require provisions to address inflationary adjustments and other contingencies, as appropriate. The Long-Term Management Fund Analysis and Schedule is a financial analysis that breaks down each of the long-term maintenance tasks, and demonstrates the cost associated with each task. An annual capitalization rate was assumed at \_\_\_\_% [*provide assumed capitalization rate*] in order to determine the amount of principal required to fully fund the non-wasting Long-Term Management Fund. The fund shall be considered fully funded at the value of \$\_\_\_\_\_ [*provide value*], based on tasks being implemented by a third party in present day dollars, equipment prices in present day dollars, as well as other necessary administrative costs (**Exhibit D-3**).



a. Long-Term Management Fund Deposits

1. The Long-Term Management Fund deposits received by the *[insert name of the holder of the Long-Term Management Fund (“Long-Term Management Fund Holder”) or Party, Conservation Easement Grantee, or land stewardship entity responsible for long-term management of the Bank, subject to USACE approval]* are to be held in trust in a fund designated in the Long-Term Management Plan.
2. The Long-Term Management Fund principal amount should not decrease in value through expenditure or investment strategy. The Long-Term Management Fund principal amount is intended to increase in value to keep up with inflation. A portion of the interest and earnings on the Long-Term Management Fund principal amount balance shall be reinvested into the Long-Term Management Fund to provide for growth of the Long-Term Management Fund commensurate with inflation using the same Consumer Price Index (CPI) adjustment formula as set forth in this Section. After the Long-Term Management Fund is 100% funded, no additional Long-Term Management Fund monies will be required from the Bank Sponsor.
3. The Parties anticipate that any Long-Term Management Fund earnings beyond those necessary to provide for growth of the Long-Term Management Fund commensurate with inflation are expected to be made available to the *[Party, Conservation Easement Grantee, or land stewardship entity responsible for long-term management of the Bank, subject to USACE approval]* to fund annual Long-Term Management of the Bank Property, as anticipated in the Long-Term Management Plan and estimate of costs in accordance with the Long-Term Management Fund Analysis and Schedule.
4. In accordance with the Long-Term Management Plan and Long-Term Management Fund Analysis and Schedule, any Long-Term Management Fund revenues (including earnings and interest) remaining after the Long-Term Management Fund is adjusted for inflation that exceed the anticipated annual Long-Term Management expenses of the Bank Property are to be retained in the Long-Term Management Fund and are expected to be made to the *[Party, Conservation Easement Grantee, or land stewardship entity responsible for long-term management of the Bank, subject to USACE approval]* to fund unexpected expenses and Adaptive Management needs.
5. In the event insufficient funding is available from the Long-Term Management Fund revenues to fund anticipated annual Long-Term Management expenses, the *[Party, Conservation Easement Grantee, or land stewardship entity responsible for long-term management of the Bank, subject to USACE approval]* shall consult with USACE and the IRT *[and the Long-Term Management Fund Holder, if applicable]* to identify the most effective means to implement the management measures and tasks with the resources available. *[The Party, Conservation Easement Grantee, or land stewardship entity*

*responsible for long-term management of the Bank, subject to USACE approval]* shall submit a proposed temporary revised Long-Term Management Plan and Long-Term Management Fund Analysis and Schedule in writing to USACE within sixty (60) calendar days after completion of consultation with the IRT. Upon written approval of the temporary revised Long-Term Management Plan by USACE *[and any required notification to the Long-Term Management Fund Holder, if applicable]*, in accordance with the Long-Term Management Fund Analysis and Schedule, the *[Party, Conservation Easement Grantee, or land stewardship entity responsible for long-term management of the Bank, subject to USACE approval]* shall implement the approved revised management measures and tasks. The original Long-Term Management Plan shall be restored in full force and effect upon expiration of the temporary revised Long-Term Management Plan, or sooner should sufficient funding become available from the Long-Term Management Fund revenues to fund originally anticipated annual Long-Term Management costs.

### **Section III: Bank Evaluation and Development**

#### **A. Bank Site Assessment by the IRT**

Representatives of the IRT have inspected the Bank Property and evaluated the Bank Sponsor's proposed development of Waters of the U.S. and/or Waters of the State or Commonwealth in the Mitigation Plan (**Exhibit C**) and have agreed upon the assignment of Credits set forth in **Exhibit F-1**.

#### **B. Bank Sponsor's Responsibilities for Bank Development**

The Bank Sponsor agrees to perform all necessary work, in accordance with the provisions of this MBI, to establish, enhance, restore, monitor, and maintain the Waters of the U.S. and/or Waters of the State or Commonwealth as described in the Mitigation Plan (**Exhibit C**), on the Bank Property until the Bank Sponsor has demonstrated to the satisfaction of USACE, in consultation with the IRT, that the Bank complies in all respects with all requirements of this MBI.

#### **C. Approvals**

The Bank Sponsor will obtain all permits, authorizations and other approvals necessary or appropriate to construct, operate and maintain the Bank, including those of any IRT agency. This MBI does not constitute or substitute for any such approval.

#### **D. Subsequent Phases**

The Bank Sponsor may propose a subsequent phase of Bank establishment by submitting a written request to USACE. Any subsequent phases of Bank establishment will need to comply with IRT documentation requirements in effect on the date of submission of the

complete documentation for the proposed phase. Any subsequent phase will be considered as either an amendment of the MBI or a new bank, as determined by USACE in consultation with the IRT. Establishment of each phase is subject to approval by USACE. Approval of this MBI does not obligate USACE or any applicable IRT agency to approve any subsequent phase.

*[Remove if not applicable: The Bank Sponsor will establish the Bank in [insert number of phases] Construction Phases. Each Construction Phase is presented in full in this MBI and within its exhibits. [Insert if each phase is independent: Each Construction Phase is independent and can be constructed alone or in conjunction with other phases and can be constructed in any sequence. Insert if one or more phases is dependent on another: The Construction Phases must be constructed in the sequence specified in the Mitigation Plan (Exhibit C).] Implement of the Mitigation Plan must be initiated no later than the first full growing season after the date of the first Credit Transfer associated with that Construction Phase. All Construction Phases must be completed within ten (10) years of the date of this MBI.*

The Bank Sponsor shall notify USACE thirty (30) calendar days before beginning and within thirty (30) calendar days after completing any Construction Phase.

If any Construction Phase has not begun after ten (10) years from when it was first approved by USACE (either in this MBI or in a written amendment to it), the Bank Sponsor must, prior to proceeding with any such Construction Phase, demonstrate that site conditions affecting the feasibility of constructing the Bank as designed have not changed and obtain written concurrence from USACE. USACE may require additional review of any such Construction Phase.

#### **E. Modification of the Mitigation Plan**

In the event that, after the MBI is signed by the Parties, the Bank Sponsor and USACE, in consultation with the IRT, determine that modifications must be made to the Mitigation Plan (**Exhibit C**) to ensure successful restoration, establishment, enhancement, or preservation of Waters of the U.S. and/or Waters of the State or Commonwealth within the Bank Property, or to comply with specific permits or other authorizations needed to establish the Bank, the Parties shall meet to discuss the required modifications, and the Bank Sponsor shall submit a written request for approval of such modifications to USACE within sixty (60) days of the meeting. If USACE, in consultation with the IRT, elects to authorize modifications to the Mitigation Plan, such authorization may be conditioned upon, among other things, a change in the number of Credits available for release. The Bank Sponsor shall revise the Credit Release Schedule in **Exhibit F-1** as directed by USACE to reflect any change in the available Credits. Upon written approval from USACE, the Bank Sponsor shall then implement all approved modifications. The Bank Sponsor must provide revised As-Built Plan drawings to USACE within ninety (90) days of completion of the modifications.

#### **F. Property Assessment and Warranty**

[Bank Name] Mitigation Bank [Version Date]

The Property Owner is responsible to ensure the Property Assessment and Warranty (**Exhibit E-4**) is true, complete, and accurate as of the date of this MBI. Should the Property Owner become aware of any errors or omissions in the Property Assessment and Warranty after the date of this MBI, the Property Owner shall notify USACE in writing within thirty (30) days of discovery. USACE, in consultation with the IRT, shall evaluate any impacts of the errors or omissions on the Bank, Bank Property, and the Grantee's interest in the Conservation Easement or the Bank Property, and USACE may find default pursuant to Section IX.E in such circumstances.

## **Section IV: Bank Establishment Date**

The Bank Establishment Date will occur and Transfer of Credits may begin only when the IRT has received documentation confirming that all of the following actions have occurred:

1. The MBI has been fully executed by all of the Parties.
2. The Conservation Easement has been (i) accepted by a Grantee that has been approved by USACE, (ii) recorded in the official records of the county in which the Bank Property is located, and (iii) a copy of the recording has been provided to USACE.
3. Any applicable Subordination Agreement(s) is executed and recorded.
4. The Bank Sponsor has complied with its obligation to furnish Financial Assurances in accordance with Section II.L.
5. The Bank Sponsor has obtained all permits, authorizations and other approvals necessary or appropriate to construct, operate, and maintain the Bank, including but not limited to those of any IRT agency.

## **Section V: Operation of the Bank**

### **A. Service Area**

Provide a description of the Service Area and its basis (8-digit U.S. Geological Survey hydrologic unit codes), as shown in **Exhibit B**.

### **B. Transfer and Use of Credits**

1. The Transfer of Credits may begin only upon the Bank Establishment Date. Bank Sponsor shall have the exclusive right to determine the price for any and all Bank Credits it offers for sale. The minimum Credit unit that may be transferred is determined by the Bank Sponsor.
2. In no case shall the number of transferred Credits of any particular type exceed the total number of Credits of that type which have been released for Transfer, as evidenced by written approval from USACE or the respective IRT agency under whose jurisdiction the Credits reside, as applicable. If USACE, in consultation with the IRT, determines that the Bank is operating at a Credit deficit (i.e., that Credit Transfers made exceed the

Credits authorized for release, as adjusted in accordance with this MBI), then USACE shall notify the Bank Sponsor of its default and take actions accordingly. Upon receipt of notification, the Bank Sponsor shall cease Credit Transfers immediately and is not authorized to resume Credit Transfers until notified in writing by USACE.

3. Use of Credits from the Bank to compensate for unavoidable impacts to Waters of the U.S. and/or Waters of the State or Commonwealth, under any permit issued by USACE and/or [TDEC, ADEM, KDOW], can only occur after approval by USACE and/or [TDEC, ADEM, KDOW]. Approval is determined on a case-by-case basis to ensure the use is appropriate to compensate for the impacts of the specific project to which the Credits are proposed to be applied.
4. The Bank Sponsor shall notify USACE and [TDEC, ADEM, KDOW] upon any Credit Transfer in accordance with Section VI.A of this MBI. Upon a Transfer of Credits, the Bank Sponsor shall enter the Credit Transfer into RIBITS.
5. If the Bank Property is adversely affected after the Bank Establishment Date, and such damage materially impairs any or all Waters of the U.S. and/or Waters of the State or Commonwealth on such affected Bank Property, then USACE may, at its discretion, direct the Bank Sponsor to suspend the Transfer of Credits and/or reduce the number of Credits allocated to the Bank in proportion to such damaged area, unless and until the Bank Sponsor has reasonably restored such damaged area pursuant to the Adaptive Management measures approved by USACE in accordance with the Adaptive Management Plan in **Exhibit C**.
6. Each Credit Transfer shall be made pursuant to a written purchase agreement in the form of **Exhibit F-2**.
7. This MBI applies only to those Credits released by agencies that are signatory to this MBI and set forth in **Exhibit F-1**.

### **C. Bank Closure Plan**

1. Upon Bank closure, no further Credit Transfer shall occur.
2. The Bank closure shall be deemed to take place upon written approval of USACE following occurrence of all of the following:
  - (a) All Performance Standards have been met and all Adaptive Management required under Section II has been completed as evidenced by:
    - (1) submission of all required annual reports in accordance with Section VI;
    - (2) the completion of all Adaptive Management measures required, if any, in accordance with the Adaptive Management Plan; and
    - (3) an on-site inspection by the IRT.
  - (b) Either (a) the last authorized Credit has been Transferred, or (b) the Bank Sponsor requests Bank closure by written notice to USACE and USACE provides written

approval of the closure.

- (c) All financial responsibilities of the Bank Sponsor have been met, including 100% funding of the Long-Term Management Fund account.

## **Section VI: Reporting**

### **A. Annual Report**

The Bank Sponsor shall submit an annual report to USACE and the IRT, in hard copy and in editable electronic format, on or before *[insert IRT approved date; for consistency consider November 30<sup>th</sup>]* of each year following the Bank Establishment Date. Each annual report shall cover the period from November 1st of the preceding year (or if earlier, the Bank Establishment Date for the first annual report) through October 31st of the current year (the “Reporting Period”). Prior to Bank closure, the Bank Sponsor shall be responsible for reporting Bank development and Adaptive Management tasks described below. After Bank closure, the *[Party, Conservation Easement Grantee, or land stewardship entity responsible for long-term management of the Bank, subject to USACE approval]* shall be responsible for reporting Long-Term Management tasks described below, biennially (every two years), as per the Long-Term Management Plan. The annual report submitted by the Bank Sponsor shall address the following:

#### **i. Bank Development**

The Bank Sponsor shall submit an annual report to USACE and the IRT that includes data, documentation, and discussion of the Bank’s progress toward meeting Performance Standards described in the Mitigation Plan in **Exhibit C**. Annual monitoring reports will be developed according to guidelines provided in applicable USACE regulations and USACE district specific guidance. The annual report shall describe any deficiencies in attaining and maintaining Performance Standards and any Adaptive Management proposed, approved, or performed. If Adaptive Management has been completed, the annual report shall also evaluate the effectiveness of that action.

#### **ii. Transfer of Credits**

The annual report submitted by the Bank Sponsor shall include an updated Credit Transfer ledger (**Exhibit F-3**) showing all Credits transferred since the Bank Establishment Date and an accounting of remaining Credits.

#### **iii. Credit Transfer Reporting**

Upon the Transfer of each and every Credit the Bank Sponsor shall enter the Credit Transfer into the RIBITS ledger, upload an electronic copy of the finalized Credit purchase agreement into the appropriate RIBITS folder, and submit to USACE:

- a. A copy of the fully executed Credit purchase agreement in the form provided at **Exhibit F-2**.
- b. An updated Credit Transfer ledger, in hard copy and in editable electronic format in the form provided at **Exhibit F-3**.

#### **iv. Reporting Compliance Measures**

If the Bank Sponsor fails to submit complete reports on time, the Bank Sponsor is in default.

- a. Reports Not Received

Annual reports not received by the IRT will result in automatic Credit Transfer suspension effective the 30th day the report is past due. The suspension will be lifted within ten (10) calendar days after the IRT receives a complete annual report.

- b. Incomplete Reports

If the Bank Sponsor has been notified by the IRT of an incomplete report, the IRT will then notify the Bank Sponsor of the date by which the report must be made complete.

#### **B. Adaptive Management and Long-Term Management**

The Adaptive Management Plan and Long-Term Management Plan contain reporting requirements that are separate from, and in addition to, the requirements listed above for the annual report.

During the Monitoring and Adaptive Management Phase, the Bank Sponsor shall submit in the annual report an itemized account of the management tasks in accordance with the Adaptive Management Plan and any Adaptive Management conducted during the Reporting Period. During the Long-Term Management Phase, the *[Party, Conservation Easement Grantee, or land stewardship entity responsible for long-term management of the Bank, subject to USACE approval]* shall submit a biennial report that contains an itemized account of the management tasks in accordance with the Long-Term Management Plan and any remedial actions conducted during the Reporting Period. Each annual report shall also include the following:

- a. The time period covered, i.e. the dates “from” and “to.”
- b. A description of each management task conducted, the dollar amount expended and time required.
- c. The total dollar amount expended for management tasks conducted during the Reporting Period.

- d. A description of the management and maintenance activities proposed for the next reporting year.
- e. A description of the overall condition of the Bank, including photos documenting the status of the Bank Property during the Reporting Period and a map documenting the location of the photo points.

## Section VII: Responsibilities of the Bank Sponsor and Property Owner

A. Without limiting any of its other obligations, including without limitation, under the Conservation Easement, the Bank Sponsor and Property Owner each hereby agrees and covenants that, during the time the Bank is in operation, prior to Bank closure:

1. [*Remove if Bank Sponsor will retain title to the Bank Property and responsibility of Long-Term Management and protection of the Bank Property:* The Bank Sponsor shall, prior to the execution of the Conservation Easement at **Exhibit E-5**, provide USACE with satisfactory evidence that the entity proposed to hold the Conservation Easement (“Grantee”) has a primary purpose of long-term land stewardship for conservation purposes consistent with the purpose of the Bank, and has agreed to hold the Conservation Easement, and otherwise complies with the requirements of the IRT.]
2. Bank Sponsor shall be responsible for all activities and costs associated with the establishment and operation of the Bank, including, but not limited to, construction, planting, Adaptive Management, documentation, maintenance, management, monitoring, and reporting, until completion of the Monitoring and Adaptive Management Phase.
3. Bank Sponsor shall assume responsibility for compensatory mitigation requirements of USACE permits for which it Transfers Credits once a USACE permittee has secured the appropriate number and type of Credit(s) from the Bank Sponsor. The Bank Sponsor shall provide USACE with the written Credit purchase agreement (**Exhibit F-2**) that confirms that the Bank Sponsor has accepted the responsibility for providing the required compensatory mitigation requirements of such USACE permit.
4. Property Owner shall not create or suffer any lien or encumbrance upon the Bank Property, other than as set forth in the Property Assessment and Warranty approved by the IRT (**Exhibit E-4**), and the Property Owner shall not execute, renew, or extend any lien, lease, license, or similar recorded or unrecorded right or interest in the Bank Property without the prior written consent of USACE and the Grantee, if a Conservation Easement has been granted.
5. Property Owner shall not construct or install any structure or improvement on, or engage in any activity or use of, the Bank Property, including mineral exploration, timber harvesting, development, excavation, draining, dredging, or other alteration of the Bank Property that is prohibited by, or not consistent and in accordance with this MBI and its exhibits.
6. Bank Sponsor shall ensure that the Bank Property is managed and maintained in



accordance with this MBI and its exhibits.

7. Property Owner shall allow, or otherwise provide for, access to the Bank Property by Bank Sponsor, Conservation Easement Grantee, USACE, the IRT agencies or their agents and designees, and third parties, as described in the Conservation Easement.
8. Property Owner shall grant to Bank Sponsor all rights and authority necessary to carry out, and shall not limit the Bank Sponsor in performing its responsibilities and obligations on and affecting the Bank Property in accordance with this MBI and its exhibits.
9. Property Owner and *[the Party, Conservation Easement Grantee, or land stewardship entity responsible for long-term management of the Bank, subject to USACE approval]* shall ensure that the Bank Property is managed and maintained in accordance with the Long-Term Management Plan, this MBI and its exhibits.

#### 10. Financial Records and Auditing

- a. Bank Sponsor and *[the Party, Conservation Easement Grantee, or land stewardship entity responsible for long-term management of the Bank, subject to USACE approval]* are required to maintain complete and accurate financial records relating to the operation of the Bank for which it is responsible, using generally accepted accounting principles (GAAP) developed by the Federal Accounting Standards Advisory Board. At the request of USACE, the Bank Sponsor and *[the Party, Conservation Easement Grantee, or land stewardship entity responsible for long-term management of the Bank, subject to USACE approval]* shall each have its financial records relating to the operation of the Bank audited by an independent licensed Certified Public Accountant (CPA) and shall submit the auditor's report to USACE upon completion.
- b. USACE, in consultation with the IRT, shall also have the right to review and copy any records and supporting documentation pertaining to the performance of this MBI. Bank Sponsor and *[the Party, Conservation Easement Grantee, or land stewardship entity responsible for long-term management of the Bank, subject to USACE approval]* agree to maintain such records for possible audit for a minimum of three years after Bank closure, or three years after the date of performance, whichever is later. Bank Sponsor and *[the Party, Conservation Easement Grantee, or land stewardship entity responsible for long-term management of the Bank, subject to USACE approval]* agree to allow the auditor(s) access to such records during normal business hours and to allow interviews of any employee or representative who might reasonably have information related to such records. Further, Bank Sponsor and *[the Party, Conservation Easement Grantee, or land stewardship entity responsible for long-term management of the Bank, subject to USACE approval]* agree to include a similar right of state and federal auditors to audit records and interview employees and representatives in any contract related to the performance of this MBI.

- B. Reasonably foreseeable technical problems, or unanticipated or increased costs or expenses associated with the implementation of actions called for by this MBI, or changed financial or business circumstances in and of themselves shall not serve as the basis for modifications of this MBI or extensions for the performance of the requirements of this MBI. An extension of one compliance date based upon or related to a single incident shall not extend any subsequent compliance dates.

## **Section VIII: Responsibilities of the IRT**

### **A. IRT Oversight**

Members of the IRT will make a good faith effort to provide timely review of annual reports and provide comments regarding Credit Releases and other associated banking actions.

### **B. Compliance Inspections**

The IRT shall conduct compliance inspections for any purpose(s) it determines as necessary to assess compliance with this MBI, subject to 48-hour advance notification to Bank Sponsor and Property Owner.

## **Section IX: Other Provisions**

### **A. Force Majeure**

1. If the Bank Sponsor or Property Owner is prevented from or delayed in performing an obligation under this MBI by an event of Force Majeure that commences after the Bank Establishment Date, USACE reserves the right to suspend the Bank Sponsor or Property Owner's obligation to perform as provided in this Subsection; the scope of such suspension will be delineated by USACE, in consultation with the IRT, pursuant to Paragraph 3 of this Subsection. In order for such suspension to apply, the Bank Sponsor or Property Owner shall bear the burden of demonstrating that a Force Majeure event has occurred.
2. Where there is an event of Force Majeure, the Party prevented from or delayed in performing its obligations under this MBI shall notify the applicable IRT member(s) as promptly as possible, but no later than seven (7) calendar days following the date of commencement of a Force Majeure event, giving full particulars of the nature of the Force Majeure event, its effect upon the performance of the Party's obligations under this MBI, and the expected timeframe of non-performance attributable to the Force Majeure event. As promptly as reasonably possible after providing notification, the Party invoking Force Majeure shall meet with the applicable IRT member(s) to discuss the course of Adaptive Management in response to such occurrence.
3. If the applicable IRT member(s) concurs that a Force Majeure event has occurred, the IRT will notify the Bank Sponsor and Property Owner. The IRT notice will identify the actions and achievements for which performance by the Property Owner or Bank

Sponsor is suspended and the time period during which performance is suspended. During the period between the event of Force Majeure and the approval of Adaptive Management measures, the Property Owner or Bank Sponsor shall continue to manage and maintain the Bank Property, to the full extent practicable, consistent with this MBI and other applicable documents.

4. Within sixty (60) calendar days of notification of concurrence from the IRT that a Force Majeure event has occurred, the Party invoking Force Majeure will develop and propose Adaptive Management measures in accordance with Section II.K to ensure the restoration of the Bank Property. Once approved by USACE, in consultation with the IRT, the Party invoking Force Majeure shall carry out the Adaptive Management within the time provided in the approved plan. Failure to develop Adaptive Management measures in accordance with the Adaptive Management Plan or to implement Adaptive Management measures determined appropriate by USACE, in accordance with this section, or where proposed Adaptive Management measures are approved and implemented, but the site conditions do not satisfy the approved plan's objective and measurable Performance Standards by the dates specified in the approved plan, shall be a default under this MBI for which the beneficiary of the Monitoring and Adaptive Management Financial Assurance may draw upon the Monitoring and Adaptive Management Financial Assurance.
5. In accordance with Section V.B.5 of this MBI, the applicable IRT member(s) may, at its discretion, direct the Bank Sponsor to suspend the Transfer of Credits and/or reduce the number of Credits allocated to the Bank in proportion to such damaged area, unless and until the Bank Sponsor has reasonably restored such damaged area pursuant to an Adaptive Management proposal approved by USACE, in consultation with the IRT.
6. Disputes over whether an event is a result of a Force Majeure shall be resolved in accordance with Section IX.B.
7. Bank Sponsor and Property Owner are not entitled to terminate this MBI under Section IX.D as a result of an event of Force Majeure.

## **B. Dispute Resolution**

The Parties agree to work together in good faith to resolve disputes concerning this MBI. Unless a Party has initiated legal action in connection with the particular dispute, any Party may elect (the "Electing Party") to employ an informal dispute resolution process whereby:

1. The Electing Party shall notify all other Parties to this MBI of the dispute through a dispute notice. The dispute notice shall identify the Parties against which the Electing Party is commencing the informal dispute resolution process ("Implicated Parties"), the position of the Electing Party (including, if applicable, the basis for contending that a violation has occurred), and the resolution the Electing Party proposes.
2. Each Implicated Party shall have forty-five (45) calendar days after receipt of the

dispute notice (or such other time as the Parties may mutually agree) to respond to the electing Party. During this time, any Party to this MBI that received the dispute notice may seek clarification of the dispute notice.

3. Within forty-five (45) calendar days after each Implicated Party's response was provided or due, whichever is later, the Electing Party and the Implicated Parties shall confer and negotiate in good faith toward a mutually satisfactory resolution, or shall establish a specific process and timetable to seek such resolution.
4. The dispute resolution process may be terminated by the Electing Party or any Implicated Party upon written notice to all other Parties to this MBI.

### **C. Conveyance of Bank or Bank Property or Other Interests**

1. All transfers of any interest in the Bank Property are subject to the applicable provisions of the Conservation Easement.
2. Property Owner shall have the right to sell, assign, transfer or convey (each a "transfer" for the purposes of this Subsection) its interest in the Bank Property at any time; *provided, however*, that any such transfer on or after the execution date of this MBI must be made in accordance with this MBI and the Conservation Easement, and shall be subject to prior written concurrence by USACE, the IRT, and Bank Sponsor.
  - (a) Such concurrence shall be subject to the requirement that the transferee assumes and agrees in writing to observe and perform all of the Property Owner's obligations pursuant to this MBI and the Conservation Easement.
  - (b) From and after the date of any transfer by Property Owner of its interest in the Bank Property in which the transferee has assumed and agreed in writing to observe and perform all of the transferor's obligations pursuant to this MBI, (a) the transferor shall have no further obligations hereunder and all references to Property Owner in this MBI shall thereafter refer to such transferee, except that the transferor's liability for acts, omissions, or breaches occurring prior to the transfer shall survive the transfer.
  - (c) Any transfer of the Property Owner's interest in the Bank Property made without the prior written concurrence of USACE and the IRT constitutes default pursuant to Section IX.E and USACE and the IRT may take action accordingly.
3. Bank Sponsor may sell or convey its entire interest in the Bank at any time, provided that no uncured event of default exists, Bank Sponsor is in full compliance with all requirements of this MBI (including all Financial Assurance requirements), and subject to the prior written approval of USACE, in consultation with the IRT. If any of the Financial Assurances required under this MBI are not completely funded at the time the Bank Sponsor requests USACE approval of a sale or conveyance, then USACE shall not approve such sale or conveyance unless and until either the current Bank

Sponsor, or the proposed replacement Bank Sponsor, shall have provided all required Financial Assurances. In addition, prior to sale or conveyance, the Bank Sponsor shall provide to each member of the IRT a written agreement signed by the replacement Bank Sponsor, acceptable to the IRT in form and substance, in which the Bank Sponsor assigns to the replacement Bank Sponsor, and the replacement Bank Sponsor assumes and agrees to perform, all of the responsibilities and obligations of the Bank Sponsor under the MBI. Any such sale or conveyance made without the prior written concurrence of USACE constitutes default pursuant to Section IX.E, and USACE may take action accordingly.

#### **D. Modification and Termination of the MBI**

##### 1. Amendment and Modification

- a. This MBI, including its exhibits, may be amended or modified only with the written approval of the Parties, which approval may be withheld or denied, in accordance with 33 C.F.R. § 332.8. All amendments and modifications shall be fully set forth in a separate document signed by all Parties that shall be appended to this MBI.

##### 2. Termination

- a. The Bank Sponsor and Property Owner may jointly withdraw the entire Bank Property and terminate this MBI at any time prior to the first Credit Transfer, provided that Waters of the U.S. and/or Waters of the State or Commonwealth existing on the Bank Property prior to the initiation of any efforts to restore or enhance the Bank Property shall be preserved in a condition at least equal to that which existed prior to initiation of Bank establishment efforts, and as the Conservation Easement may require.
- b. In the event this MBI is terminated or the Bank is closed prior to the Transfer of all authorized Credits, any remaining Credits under this MBI shall be extinguished and will no longer be available for Transfer.
- c. USACE, in consultation with the IRT, may terminate this MBI if the Bank Sponsor or Property Owner sells or conveys the Bank or the Bank Property without the prior written concurrence of USACE, as required by Section IX.C.
- d. The *[insert appropriate agencies: USEPA, USFWS, NRCS, and other applicable federal and state agencies]* may each terminate its participation in this MBI upon written notice to all other Parties. This MBI will continue in full force and effect as to the remaining Parties.
- e. In the event termination of this MBI is commenced, the Bank Sponsor agrees to fulfill its pre-existing obligations to perform all establishment, monitoring, maintenance, management, and remediation responsibilities that arise directly from Credits that were transferred at the time of termination.

- f. Nothing in this Section is intended or shall be construed to limit the legal or equitable remedies (including specific performance and injunctive relief) available to USACE, *[insert other signatory federal and state agencies]* in the event of default by the Bank Sponsor or the Property Owner.

## **E. Default**

1. The Bank Sponsor or Property Owner shall be in default if that Party fails to observe or perform any obligations or responsibilities required of it by this MBI. In the event the Bank Sponsor or Property Owner realizes it is in default, it shall promptly notify the other Parties.
2. Once the Parties receive notification or otherwise become aware that the Bank Sponsor or Property Owner is in default, the USACE, in consultation with the IRT, will identify the appropriate action(s) to be taken and the appropriate schedule for taking such actions; USACE will notify the Property Owner and Bank Sponsor of its determination. These actions may include, but are not limited to, suspending Credit Transfers, Adaptive Management, reducing available Credits, utilizing Financial Assurances, and terminating the MBI. USACE may confer with the Bank Sponsor and Property Owner prior to making its determination.
  - i. *Responsive Actions Other Than the Utilization of Financial Assurances*
    - (a) Except as provided otherwise in (b), the Bank Sponsor or Property Owner, as identified by USACE, will carry out the specified action(s) on the schedule specified by USACE.
    - (b) During the optional dispute resolution process as described in Section IX.B, the Parties may unanimously agree to the selection of different actions or schedules. Except where such agreement is reached or as provided otherwise in (c) through (g) below, where the Bank Sponsor or Property Owner (as applicable) invokes the informal dispute resolution process described in Section IX.B, the agreed upon action must be performed to the satisfaction of the USACE, in consultation with the IRT, within fifteen (15) days after the informal dispute resolution process has been concluded or terminated.
    - (c) Even if the informal dispute resolution process in Section IX.B is invoked, where USACE, in consultation with the IRT, determines that Credit Transfers must be suspended, the Bank Sponsor will suspend the Transfer of the specified Credits until the agency under whose jurisdiction the Credits reside has agreed to such resumption in writing.
    - (d) Even if the informal dispute resolution process in Section IX.B is invoked, where USACE, in consultation with the IRT, determines that a Credit reduction is required due to damage to the Property or failure to achieve Performance

Standards, the Bank Sponsor will abide by the Credit reduction until the agency under whose jurisdiction the Credits reside has agreed to such restoration of Credits in writing.

- (e) Even if the informal dispute resolution process in Section IX.B is invoked, where an IRT agency elects to terminate its participation in the Bank, it may do so at any time after the Parties have been notified of the default.
- (f) Even if the informal dispute resolution process in Section IX.B is invoked, where USACE, in consultation with the IRT, determines that the Bank Sponsor or Property Owner must desist from an activity because it may violate federal or state law, the Bank Sponsor or Property Owner (as applicable) will discontinue the activity as described in the USACE's determination until USACE has agreed to such resumption in writing.
- (g) Even if the informal dispute resolution process in Section IX.B is invoked, where USACE, in consultation with the IRT, determines that the Bank Sponsor or Property Owner must desist from an activity because, under this MBI, it must be approved but no approval has been given, the Bank Sponsor or Property Owner (as applicable) will desist from the activity until USACE has agreed to such resumption in writing.

ii. *Utilizing Financial Assurances as a Responsive Action*

- (a) Except as provided in (c) or as otherwise provided herein, where USACE, in consultation with the IRT, determines that the Financial Assurances must be drawn upon, the Bank Sponsor shall cure such non-compliance within thirty (30) days of receipt of the aforementioned USACE determination. If said cure reasonably requires more than thirty (30) days, Bank Sponsor shall, within the thirty (30) day period, submit to the Parties for review and approval a plan and time schedule to diligently complete a cure. Bank Sponsor shall complete such cure in accordance with the approved plan.
- (b) Except as provided in (c), the holder may draw upon the appropriate Financial Assurance as necessary to continue Bank development, management, or operation, as provided in Section II.L, in the following circumstances:
  - (i) the Bank Sponsor has not been granted more than thirty (30) days to cure and has not, to the satisfaction of USACE, cured the default within the thirty (30) day time-to-cure period;
  - (ii) the Bank Sponsor has submitted a plan within the thirty (30) day time-to-cure period, but the plan is considered insufficient or inappropriate by USACE;
  - (iii) the Bank Sponsor has been granted more than thirty (30) days to cure in

accordance with an approved plan, and has not, to the satisfaction of the USACE, cured the default within the specified time period;

(c) If the Bank Sponsor disputes USACE's determination, it shall invoke the dispute resolution procedures of Section IX.B within thirty (30) days of receipt of the determination. If the informal dispute resolution process has been invoked, the holder of the applicable Financial Assurance shall not draw upon financial securities until such time as the informal dispute resolution process has been concluded or terminated.

3. This Section shall not be construed to modify or limit any specific right, remedy, or procedure in any Section of this MBI or any remedy available under applicable state and/or federal law.

#### **F. Controlling Language**

The Parties intend the provisions of this MBI and each of the documents incorporated by reference in it to be consistent with each other, and for each document to be binding in accordance with its terms. To the fullest extent possible, these documents shall be interpreted in a manner that avoids or limits any conflict between or among them. However, if and to the extent that specific language in this MBI conflicts with specific language in any document that is incorporated into this MBI by reference, the specific language within the MBI shall be controlling. The captions and headings of this MBI are for convenient reference only, and shall not define or limit any of its terms or provisions.

#### **G. Entire Agreement**

This MBI, and all exhibits, appendices, schedules and agreements referred to in this MBI, constitute the final, complete, and exclusive statement of the terms of the agreement between and among the Parties pertaining to the Bank, and supersede all prior and contemporaneous discussions, negotiations, understandings or agreements of the Parties. No other agreement, statement, or promise made by the Parties, or to any employee, officer, or agent of the Parties, which is not contained in this MBI or incorporated herein by reference, will be binding or valid, with respect to the subject matter hereof. No alteration or variation of this MBI will be valid or binding unless contained in a written amendment in accordance with Section IX.D.1. Each of the Parties acknowledges that no representation, inducement, promise or agreement, oral or otherwise, has been made by any of the other Parties or anyone acting on behalf of any of the Parties unless the same has been embodied herein.

#### **H. Reasonableness and Good Faith**

Except as specifically limited elsewhere in this MBI, whenever this MBI requires a Party to give its consent or approval to any action on the part of the other, such consent or approval shall not be unreasonably withheld or delayed. If the Party disagrees with any determination covered by this provision and reasonably requests the reasons for that determination, the determining Party shall furnish its reasons in writing and in reasonable detail within thirty (30) calendar days following the request.



## **I. Successors and Assigns**

This MBI and each of its covenants and conditions shall be binding on and shall inure to the benefit of the Parties and their respective successors and assigns subject to the limitations on transfer set forth in this MBI.

## **J. Partial Invalidity**

If a court of competent jurisdiction holds any term or provision of this MBI to be invalid or unenforceable, in whole or in part, for any reason or as to any Party, the validity and enforceability of the remaining terms and provisions, or portions of them, shall not be affected unless an essential purpose of this MBI would be defeated by loss of the invalid or unenforceable provision or its invalidity or unenforceability as to any Party.

## **K. Notices**

1. Any notice, demand, approval, request, or other communication permitted or required by this MBI shall be in writing and deemed given when delivered personally, sent by receipt-confirmed email, or sent by recognized overnight delivery service, addressed as set forth below, or five (5) calendar days after deposit in the U.S. mail, postage prepaid, and addressed as set forth below.
2. Notice by any Party to any other Party shall be given to all Parties. Such notice shall not be effective until it is deemed to have been received by all Parties.
3. Addresses for purposes of giving notice are set forth below. Any Party may change its notice address by giving notice of change of address to the other Parties in the manner specified in this Section.

[Insert: Bank Sponsor:] [NAME]

[ADDRESS]

Attn:

Telephone:

Email:

[Insert: Property Owner:] [NAME]

[ADDRESS]

Attn:

Telephone:

Email:

[Insert appropriate agencies: IRT Members:]

U.S. Army Corps of Engineers

\_\_\_\_\_ District

[DISTRICT ADDRESS]

Attn: Chief, Regulatory Branch/Division

Telephone:

Email:

U.S. Fish and Wildlife Service

\_\_\_\_\_ Field Office

[FIELD OFFICE ADDRESS]

Attn: Field Supervisor

Telephone:

Email:

U.S. Environmental Protection Agency Region IV

[REGIONAL OFFICE ADDRESS]

Attn: Chief, Wetlands Regulatory Section

Telephone:

Email:

[Insert all other participating IRT agencies.]

[AGENCY OFFICE ADDRESS]

[AGENCY CONTACT]

Telephone:

Email:

## **L. Counterparts**

This MBI may be executed in multiple counterparts, each of which shall be deemed an original and all of which together shall constitute a single executed agreement.

## **M. No Third-Party Beneficiaries**

This MBI shall not create any third-party beneficiary hereto, nor shall it authorize anyone

not a Party hereto to maintain any action, suit or other proceeding, including without limitation, for personal injuries, property damage or enforcement pursuant to the provisions of this MBI. The duties, obligations, and responsibilities of the Parties to this MBI with respect to third parties shall remain as otherwise provided by law in the event this MBI had never been executed.

**N. Availability of Funds**

Implementation of this MBI by the IRT is subject to the requirements of the Anti-Deficiency Act, 31 U.S.C. § 1341, and the availability of appropriated funds. Nothing in this MBI may be construed to require the obligation, appropriation, or expenditure of any money from the U.S. Treasury. No agency of the IRT is required under this MBI to expend any appropriated funds unless and until an authorized official affirmatively acts to commit to such expenditures as evidenced in writing.

**O. No Partnerships**

This MBI shall not make or be deemed to make any Party to this MBI an agent for or the partner or joint venture of any other Party.

**P. Applicable Laws**

Among the Bank Sponsor, Property Owner and federal agencies, the applicable statutes, regulations, policies, directives, and procedures of the United States will govern this MBI and all documents and actions pursuant to it. Among the Bank Sponsor, Property Owner and state agencies, this MBI shall be governed by and construed according to the applicable laws, statutes, regulations, orders, policies and requirements of the state and its agencies with jurisdiction, including without limitation the applicable authorities identified in Section I.B of this MBI.

**Q. No Federal Contract or Monetary Damages**

USACE approval of this MBI constitutes the regulatory approval required for the *[insert the name of the Mitigation Bank]* to be used to provide compensatory mitigation for Department of Army permits pursuant to 33 C.F.R. § 332.8(a)(1). This MBI is not a contract between the Bank Sponsor or Property Owner and USACE or any other agency of the federal government. Any dispute arising under this MBI will not give rise to any claim by the Bank Sponsor or Property Owner for monetary damages. This provision is controlling notwithstanding any other provision or statement in the MBI to the contrary.

**Section X: Execution**

Each of the undersigned *[remove names if not on IRT or signatory to this MBI]* certifies that he or she has full authority to enter into this MBI. This MBI shall be deemed executed on the date of the last signature by the Parties. Within thirty (30) calendar days of MBI execution, the Bank Sponsor shall upload the final signed MBI, including all of its exhibits, to the appropriate folders in RIBITS and provide an electronic copy to each member of the IRT.

IN WITNESS WHEREOF, the Parties have executed this MBI as follows:

Bank Sponsor

By: \_\_\_\_\_  
[Name] Date

Property Owner

By: \_\_\_\_\_  
[Name] Date

U.S. Army Corps of Engineers, \_\_\_\_\_ District

By: \_\_\_\_\_  
[Name] Date

U.S. Environmental Protection Agency, Region IV

By: \_\_\_\_\_  
[Name] Date

U.S. Fish and Wildlife Service, \_\_\_\_\_ Office

By: \_\_\_\_\_  
[Name] Date

U.S. Department of Agriculture, NRCS

By: \_\_\_\_\_  
[Name] Date

Tennessee Wildlife Resources Agency

[Bank Name] Mitigation Bank [Version Date]

By: \_\_\_\_\_  
[Name] Date

Kentucky Division of Water

By: \_\_\_\_\_  
[Name] Date

Kentucky Department of Fish and Wildlife Resources

By: \_\_\_\_\_  
[Name] Date

Tennessee Department of Environment and Conservation

By: \_\_\_\_\_  
[Name] Date

Tennessee Valley Authority

By: \_\_\_\_\_  
[Name] Date

Alabama Department of Environmental Management.

By: \_\_\_\_\_  
[Name] Date

Alabama Department of Conservation and Natural Resources

By: \_\_\_\_\_ Date \_\_\_\_\_  
[Name]

DRAFT